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incogitatus; but if such burdens had been then in being, it is impossible that heritors would have consented to make such ground-annuals absolutely free.—*Answered*, This ground-annual has been paid past memory, and never any such retention granted on account of cess, which evinces it has been designed for a free annuity; and they might as well plead, that an infeftment of annualrent might suffer deduction for cess, which was never pretended.—*Replied*, That prescription and immunity, though never so long, can never be obtruded against posterior supervenient acts of Parliament, imposing public burdens; and this ground-annual being relative to no sum on which it is made redeemable, it can be in no better case than an irredeemable right of property, which can plead no exemption from cess.——THE LORDS, in their reasoning, inclined to think, that such ground-annuals are not diminishable by cess, but did not decide at this time. They seem to be somewhat of the nature of a feu-duty, which payeth no part of the cess, but the property is only burdened with it; and they might as well plead, that ground-annuals should be liable to retention.

Fol. Dic. v. 1. *p.* 221. *Fountainhall, v.* 2. *p.* 465.

1712. *February* 12.

MARY SCOT, Spouse of PATRICK SCOT of Halkshaw, *against* ANN, DUTCHESS of BUCCLEUGH.

No 16.

One of two cautioners in a bond, having paid the debt on distress, and got a discharge thereof, action of relief was found competent to the distressed cautioner, against the other cautioner, notwithstanding a restriction in the assignation, which screened him only from the direction at the assignee's instance, but could not evacuate the implied obligation of relief among cautioners.

THE deceased Captain William Scot as principal, Walter Earl of Buccleugh, and John Scot of Sintoun as cautioners, having granted bond to Sir William Dick for L. 1000 Scots, with annualrent and penalty, which Sir William assigned to Sir John Scot of Scotstarbet, in so far as might be extended against the principal debtor and John Scot of Sintoun. This bond and assignation came by progress in the person of John Smith of Falla, who pursued Mary Scot, heir by progress to John Scot, one of the co-cautioners in the principal bond, for payment. She intimated the distress to the Dutchess of Buccleugh, who represented the Earl, the other co-cautioner, and being decerned to pay, and having paid upon distress the whole debt, and got a discharge thereof, pursued the Dutchess of Buccleugh as representing the Earl, the other co-cautioner, for relief of the one half.

Alleged for the defender; She can be liable in no relief to the pursuer, because, 1*mo*, The bond, which is the ground of the process, was assigned by the original creditor to Sir John Scot, only in so far as might be extended against the principal debtor, and not against the Earl of Buccleugh; whereby the Earl was free from any action that could follow upon the restricted assignation, as effectually as if the creditor had discharged him; 2*do*, The obligement of relief is prescribed *non utendo*, in so far as the bond was not only registred against John Scot of Sintoun in the year 1625, but a decreet thereon recovered against

his heir in the year 1658, which was a sufficient distress to found action of relief, Vans *contra* Law, No 42. p. 2114.; and actions of warrandice or relief prescribed by elapsing of 40 years after distress or eviction. No 16.

Replied for the pursuer; The restriction in the original conveyance did indeed bind up the assignees from direct action against the Earl of Buccleugh, and his representatives; but the pursuer founds her action of relief against the Dutchess, not upon the original obligation and conveyance thereof, which are fully extinguished by the discharge; but upon the common ground of law, which affords relief from one cautioner to another, upon payment *ex natura rei*, as *negotium utiliter gestum* for both. Though the creditor by the discharging, or granting a limited assignation, could have exonered any of the cautioners of their obligation to him or his assignees, he could not by any deed of his extinguish the implied obligation arising from law betwixt the cautioners, or betwixt them and the principal debtor; 2*do*, Albeit the bond might prescribe in 40 years as to the creditor; the obligation of relief could not prescribe against the cautioner, till the action itself was competent; that is, when payment was made. Where there is an express obligement to relieve, the prescription runs from the time the receiver could pursue, viz. from the first appearance of distress, and he is not to wait for his own trouble; but a cautioner having no relief written or implied against the co-cautioner, could not pursue till actual payment.

THE LORDS repelled the Dutchess's defences founded on the restriction of the assignation and prescription.

July 1. 1712.—In the action at the instance of the Lady Halkshaw, against the Dutchess of Buccleugh, 12th February 1712, for relieving the pursuer of the equal half of the sum in a bond granted by Captain Scot as principal, and the Earl of Buccleugh and John Scot of Sintoun as cautioners, to Sir William Dick, assigned by Sir William to Scotstarbet only against the principal, and Sintoun, which the pursuer, as representing Sintoun, paid upon distress;

Alleged for the defender; It was competent for the pursuer to have objected when she was distressed, that she could not be liable for the co-cautioner's share, whom the creditor had so liberated. For a creditor exacting payment *in solidum* from one cautioner, is obliged to assign against all the co-obligants, *L.* 17. *ff. de Fidejus. L.* 11. *C. eod.* Yet, cautioners are sometimes induced to engage for a debtor, in view of having a proportionable relief from the co-cautioners, if the principal should fail. And the original creditor, who by his fact of restricting the assignation, put his assignee out of capacity to assign more than the half of the sum, could not distress the pursuer for the whole: And if she hath officiously paid more, without proponing such an obvious defence, *sibi imputet* that she cannot insist for relief.

Replied for the pursuer; The creditor stood under no obligation to assign this debt to the pursuer, upon payment; and therefore she cannot be charged with omitting a defence or exception that was not relevant. For albeit, by the ci-

No 16. vil law, creditors were obliged *vendere cæterorum Nomina ei qui solvere paratus erat;* because by that law, neither *Correi debendi*, nor *Fidejussores* had relief *nisi Actio cessa fuerat*, or *ex Pacto;* yet with us, though assignations may be requisite in some cases, where the party paying cannot have relief, co-principals and cautioners are liable in mutual relief *ex natura rei*; and so the creditor, to whom the pursuer paid the debt, was under no necessity to assign the same to her, who had relief competent to her *aliunde*. Consequently, the pursuer had no relevant defence to save her from total payment against the creditor, who could not assign against the co-cautioner.

THE LORDS found, That the restricted quality in the assignation did not found a relevant defence to the pursuer, against paying more than the half of the debt.

Fol. Dic. v. 1. *p.* 221. *Forbes, p.* 586. & 605.

*** Fountainhall reports the same case.

Captain William Scot as principal, Walter Earl of Buccleugh, and John Scot of Sinton as cautioners, grant bond to William (afterwards Sir William Dick) for L. 1000 Scots in 162[illegible]. Sir William assigns this bond to Sir John Scot of Scotstarbet, but with this express quality and restriction, in so far as might be extended against the principal debtor, and John Scot of Sinton, and no farther. Then it comes into the person of Patrick Porteous of Halkshaw, and he transfers it to John Smith of Falla, who pursues Mary Scot, the said Halkshaw's lady, and upon the passive titles as representing Scot of Sinton the cautioner, obtains a decreet against her; but she, during the dependence, intimates the distress to the Dutchess; and being forced to pay, she with concourse of her husband pursues the Dutchess as heir of the co-cautioner, to pay the half of the foresaid principal sum, annualrents, and penalties, because both our predecessors being bound *in solidum* to the creditor, I have paid the whole, and so liberate you of that half fell to you; which being *utiliter gestum* for you, it obliges you to pay me back your share. *Alleged* for the Dutchess; you can neither have regress nor relief against me, as representing the other co-cautioner; because the bond, the ground of your process, was assigned by Sir William Dick the original creditor, only in so far as might be extended against the principal, and Scot of Sinton, but not against the Earl of Buccleugh. 2*do*, The bond was once established in Halkshaw, your husband's person, with the same restricting quality; whose acceptation of it must operate the Dutchess's liberation against his assignees, and his wife, or rather his own payment; that being a plain contrivance to found a process against her, and so must exclude the Lady Halkshaw's relief, founded on a collusive decreet patched up in the trust betwixt them. *Answered*, the pursuer founds nothing on the assignation, but on the common inviolable ground of law, that affords one cautioner relief against another *pro rata*,

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when I have paid the whole, and so *negotium tuum utiliter gessi*, arising *ex natura rei* without any assignation. And the translation of it to her husband can never prejudge her, he had it *tanquam quilibet*, and can never be charged with collusion; for *in limine* of Smith's action against her, she intimated the plea to the Dutchess, who should have defended her, but had nothing to say against the debt. *Replied*, That Dick, the creditor, could have discharged Buccleugh, and by so doing have liberate him of the bond; and here he hath done the equivalent, by assigning it allenarly against the principal and one of the cautioners, and not against the other; and the common law did not sustain any such regress, but where they were expressly assigned thereto by the creditor *l.* 17. *D. de fidejussor.* & *l.* 11. *C. eod. tit. ita fidejussoribus succuritur, ut compellatur creditor ei qui solvere paratus est cæterorum nomina vendere*; and therefore Halkshaw and his Lady not having craved an assignation, they can never burden the co-cautioner, especially having taken a restricted assignation; for *limitata causa limitatum producit effectum. Duplied*, This equipollency betwixt a qualified assignation and a discharge, is a plain sophism, extending the conclusion beyond the premises; for it is not in the creditor's power to give away or extinguish a cautioner's right of recurring either against the principal or the conjunct cautioners; for *pactis privatorum non derogatur juri communi:* and it will not admit of any convincing reasoning, to say that the creditor can loose or dispense with the mutual relief cautioners owe one another: He can discharge the whole debt when he will, but not the subaltern obligations among the *correi debendi*. And that part of the Roman law takes no place with us; for they were so precisely nice in their forms, they allowed cautioners no recourse but *ubi actio cessa fuit*, which answers to the stile of our assignations: And they had the three remedies, *divisionis, ordinis* in discussing, and *actionum cedendarum*, so they had no relief *nisi ex pacto*; but with us it arises *ex natura negotii* without any stipulation. THE LORDS repelled the Dutchess's defence on the restriction; and found it did not debar the Lady Halkshaw pursuer from seeking relief of the half: Though several of the Lords were of a different opinion. 2*do*, *Alleged* for the Dutchess; this pursuit was prescribed, because 40 years are run since 1658, at which time Sinton was first distressed; and he did not insist on his obligement for the space of 40 years after, and so has lost it *non utendo*. *Answered*, there is a great difference betwixt the obligation itself, and the obligement of relief resulting to the cautioner therefrom; the bond prescribes from its date, at least from its term of payment; but the relief never begins to prescribe till actual payment be made by one of the cautioners, and only 40 years negligence after that loses and extinguishes it. It is true, warrandice prescribes not only from the eviction, but from the distress; but it is not so in reliefs, where it only commences from the payment. *Replied*, This distinction is groundless; for the Lords have found relief competent even before payment, as Vanse *contra* Law, No 42. p. 2114.; yea, an adjudication of a principal debtor's estate was permitted to go on, at the

No 16. instance of a debtor distressed by a charge of horning, though no payment made, No 12. p. 140.; and a delaratory action was certainly competent to her and her cedents against the Dutchess, after the decreet 158, that the Dutchess on payment should be liable to relieve her *pro rata*. *Duplied*, The case of the decisions cited are where there is an express obligement to relieve, either indefinitely or *ad certam diem;* which is not the case here: And the declaratory action, invented by the Dutchess's lawyers, is an chimerical imagination, having no more foundation in law than if a creditor, by a conditional bond, should immediately before existence of the condition raise a declarator against the granter, that his bond shall be effectual when the condition shall happen to exist; which would certainly be considered an empty airy process. THE LORDS repelled this second defence of prescription. *3tio*, *Alleged* for the Dutchess; that the pursuer, as heir, and deriving right from Sir John Scot, can have no right to this bond, it being moveable; for though it was heritable as bearing annualrent, and prior to the act of parliament 1641, yet the decreet taken on it in 1658 made it moveable, even as bonds bearing infeftment became moveable by requisition, as Stair observes *lib.* 2. *tit.* 1. § 4. and Nasmith *contra* Ruthven, *voce* HERITABLE AND MOVEABLE; and Fairholm *contra* Montgomery, *voce* PASSIVE TITLE: and heritable bonds are rendered moveable by any intimation the creditor makes, to express his mind not to let the money lie any more in the debtor's hand, but to lift it. Now the taking a decreet signifies abundantly his design to have his money, and so being moveable, this sum fell to the executors, and is not validly conveyed to this pursuer by the heir. *Answered*, The taking a decreet is no indication of the creditor's mind to have his money; seeing no charge of horning, arrestment, or other diligence followed thereon for many years thereafter; so it is not the commencement or first step of diligence that alters or changes the nature of an heritable bond, but the continuation thereof by horning, requisition, or the like explicit deeds, which is the case of the decision adduced; and even where horning or requisition has been used, they return to be heritable, if he for a considerable space desist from farther diligence, or accept of his annualrents: So that decreet was no more but a constitution of the debt, and no declared resolution to lift the money. THE LORDS found the decreet did not make the bond moveable, unless a charge of horning had followed thereon. *See* HERITABLE AND MOVEABLE.

Fountainhall, v. 2. *p.* 731.

1731. *February.* GRAHAM *against* LITTLE.

No 17. A GRANTER of a bond of presentation having paid the debt, upon failing to present the person of the debtor, and having taken an assignation, was not found entitled to relief against the cautioners in the original bond. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 222.